A

TENG TONG KEE

v.

NIKMAT JASA PILING SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ALAUDDIN MOHD SHERIFF JCA
ARIFIN JAKA JCA
[CIVIL APPEAL NO: W-02-236-1998]

C

21 FEBRUARY 2006

LABOUR LAW: *Employment - Dismissal - Constructive dismissal - Evidence and proof - Evidential burden - Whether discharged - Whether there was a dismissal - Whether claimant adduced evidence to raise issue*

D

of dismissal - Failure of claimant to call material witness, consequence of - Evidence Act 1950, ss. 101, 102, 114(g)

The appellant ('the claimant') commenced employment with the respondent ('the company') on 1 April 1991 as a site manager. On 2 May 1992 he was (allegedly) told by one Mr Chua, a director of the company, that he had been dismissed by Mr Lim, the managing director, and that he would have to return the keys to the store and the lorry. On 3 May 1992, the claimant reported for work as usual but was refused entry into the company's premises. Later that day, the claimant met up with Mr Lim but the meeting became hostile and the matter remained unresolved. The claimant then went on leave from 4 May 1992 to 17 May 1992 (which leave was applied for on 29 April 1992). On 12 May 1992, the claimant wrote to the company intimating that unless he was reinstated by 18 May 1992, he would consider himself as having been constructively dismissed. The company did not reply.

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The matter was subsequently referred to the Industrial Court and the said tribunal found for the claimant and awarded him 24 months' back-wages *in lieu* of reinstatement. The sum awarded, however, was reduced by 20% for 'contributory conduct'. Aggrieved, the company applied for *certiorari* and the High Court quashed the award handed down by the Industrial Court (Award No. 119 of 1995). The claimant then appealed to the Court of Appeal.

H

I

Held (dismissing the appeal)
Per Alauddin Mohd Sheriff JCA

(1) With respect to the claimant's allegation that he was told by Mr Chua on 2 May 1992 that he had been dismissed by Mr Lim, which allegation was denied by the company, the learned judge correctly held that whilst the burden of establishing that the claimant had been dismissed with just cause and excuse (s. 20 Industrial Relations Act 1967) laid on the company (s. 101 Evidence Act 1950), the claimant had nevertheless failed to adduce or introduce evidence to raise the issue that he had been dismissed (s. 102 Evidence Act 1950). The claimant's failure to call Mr Chua as a witness was held against him by the learned judge, and rightly so. It was not justifiable or reasonable for the Industrial Court to have come to the conclusion that the claimant had been constructively dismissed. (paras 8, 9, 10, 11, 12, 13 & 14)

(2) The Industrial Court was also wrong to have invoked s. 114(g) of the Evidence Act 1950 against the company for not calling Mr Chua. Indeed, the 'evidential burden' (respecting the issue whether there was a dismissal) has not even shifted onto the company as yet. On the contrary, the learned judge was right in invoking s. 114(g) of the Evidence Act 1950 against the claimant for not calling Mr Chua. (paras 15, 16 & 17)

(3) The company's failure to reply the claimant's letter of 12 May 1992 could not be taken as conclusive evidence that the claimant had been dismissed without just cause and excuse. The learned judge was right in so holding and the Industrial Court was wrong to have concluded otherwise. (paras 18 & 19)

(4) The onus was on the claimant to show that his application for leave had been accepted and approved by the company. (para 21)

Bahasa Malaysia *translation of headnotes*

Perayu ('yang menuntut') mula bekerja dengan responden ('syarikat') pada 1 April 1991 sebagai pengurus tapak. Pada 2 Mei 1992, yang menuntut (kelihatannya) diberitahu oleh seorang Mr Chua, seorang pengarah syarikat, bahawa perkhidmatannya telah ditamatkan oleh Pengarah Urusan, Mr Lim, dan dengan itu beliau

perlu memulangkan kunci-kunci stor dan lori. Pada 3 Mei 1992, yang menuntut melapor diri untuk bekerja seperti biasa, tetapi tidak dibenar memasuki premis syarikat. Yang menuntut kemudian bercuti dari 4 Mei 1992 hingga 17 Mei 1992 (dipohon pada 29 April 1992). Pada 12 Mei 1992, yang menuntut menulis kepada syarikat menyatakan bahawa kecuali beliau diterima bekerja semula pada 18 Mei 1992, beliau akan menganggap dirinya sebagai telah diberhentikan kerja secara konstruktif. Surat tidak dibalas oleh syarikat.

Pertelingkahan kemudian dirujuk ke Mahkamah Perusahaan di mana tribunal tersebut membuat keputusan yang memihak kepada yang menuntut dengan mengawardkan gaji tertunggak 24 bulan sebagai ganti pengambilan semula. Jumlah award, bagaimanapun, telah dikurangkan 20% kerana 'kelakuan sumbangan'. Terkilan, syarikat memohon *certiorari* dan berikutnya award Mahkamah Perusahaan (Award No. 119 Tahun 1995) telah dibatalkan oleh Mahkamah Tinggi. Yang menuntut merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan)
Oleh Alauddin Mohd Sheriff HMR:

(1) Berhubung pengataan yang menuntut bahawa beliau telah diberitahu oleh Mr Chua pada 2 Mei 1992 bahawa beliau telah dibuang kerja oleh Mr Lim, yang mana telah disangkal oleh syarikat, yang arif hakim telah merumuskan dengan betulnya bahawa, sementara beban membuktikan bahawa yang menuntut telah dibuang kerja tanpa sebab dan alasan yang adil (s. 20 Akta Perhubungan Perusahaan 1967) terletak di tangan syarikat (s. 101 Akta Keterangan 1950), yang menuntut bagaimanapun telah gagal mengemukakan atau membawa masuk keterangan untuk membangkitkan isu bahawa beliau telah dibuang kerja (s. 102 Akta Keterangan 1950). Kegagalan perayu memanggil Mr Chua sebagai saksi telah diambil oleh yang arif hakim sebagai menentang kedudukan yang menuntut, dan beliau betul dalam dapatannya itu. Adalah tidak munasabah atau berjustifikasi bagi Mahkamah Perusahaan untuk mencapai konklusi bahawa yang menuntut telah dibuang kerja secara konstruktif.

(2) Mahkamah Perusahaan juga khilaf apabila membangkitkan s. 114(g) Akta Keterangan 1950 terhadap syarikat kerana tidak memanggil Mr Chua. 'Beban bukti' (berkaitan isu sama ada wujud pembuangan kerja) ketika itu masih belum beralih

kepada syarikat. Sebaliknya, yang arif hakim betul apabila mengenakan s. 114(g) Akta Keterangan 1950 ke atas yang menuntut kerana tidak memanggil Mr Chua.

(3) Kegagalan syarikat membalas surat yang menuntut bertarikh 12 Mei 1992 tidak boleh diambil sebagai bukti konklusif bahawa yang menuntut telah dibuang kerja tanpa alasan dan sebab yang adil. Yang arif hakim betul dalam dapatannya sedemikian, dan Mahkamah Perusahaan khilaf apabila memutuskan sebaliknya.

(4) Beban adalah terletak pada yang menuntut untuk menunjukkan bahawa permohonan cutinya telah diterima and diluluskan oleh syarikat.

Case(s) referred to:
International Time & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(refd)***
Pan Global Textiles Bhd, Pulau Pinang v. Ang Beng Teik [2002] 1 CLJ 181 FC ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102, 114(g)
Industrial Relations Act 1967, s. 20

Other source(s) referred to:
Augustine Paul, *Evidence Practice and Procedure,* 2nd edn, p 704

For the appellant - Wong Keat Ching; M/s Zul Rafique & Partners
For the respondent - Chang Kong Weng; M/s Stanley Chang & Partners

Reported by Gan Peng Chiang

JUDGMENT

Alauddin Mohd Sheriff JCA:

Factual Background

[1] The appellant was an employee of the respondent with effect from 1 April 1991. The appellant claimed that he was constructively dismissed by the respondent with effect from 18 May 1992. At that time he was drawing a salary of RM2,000 per month as a Site Manager.

[2] The events leading to the appellant's 'constructive' dismissal are as follows:

(a) On 2 May 1992, one Mr. Chua, a Director of the respondent told the appellant that he was sacked and asked the appellant to hand over the keys to the store and lorry. Mr. Chua told the appellant that this instruction came from the Managing Director of the respondent, one Lim Hock Hing (COW2). No reasons were given for this decision.

(b) On 3 May 1992 the appellant went to work but was refused entry into the respondent's premises. The appellant was told by Mr. Chua again that he (the appellant) had been sacked and that the appellant should go and see the Managing Director to confirm the matter.

(c) On that same day (3 May 1992) the appellant went to see the Managing Director and asked why his services with the respondent was terminated. The Managing Director replied that he could do what he liked since he was the Managing Director of the respondent. Thereafter, an argument ensued between the two. There was an exchange of vulgar language in Hokkien and Cantonese. The Managing Director hit the table and shouted at the appellant to "get out of my place".

(d) Prior to that, the appellant had applied for leave from 4 May 1992 to 17 May 1992, which leave application was made on 29 April 1992.

(e) On 12 May 1992 the appellant wrote to the respondent informing the respondent *inter alia* that unless he was reinstated by 18 May 1992 he would consider himself 'constructively' dismissed.

(f) The respondent did not reply to the appellant's letter of 12 May 1992.

[3] Pursuant to his 'constructive' dismissal, the appellant filed representations under s. 20 of the Industrial Relations Act 1967 ("the Act") which resulted in his case being referred to the Industrial Court for adjudication.

[4] The matter was heard by the Industrial Court and the Industrial Court handed down Award No. 119 of 1995 (see pp. 88 to 100 Appeal Record) in favour of the appellant. The appellant was awarded backwages (limited to 24 months) and

compensation *in lieu* of reinstatement. The award sum was reduced by 20% due to contributory conduct. The total sum awarded to the appellant was RM43,280.

[5] Being dissatisfied with the award the respondent moved the High Court at Kuala Lumpur for an order of *certiorari* to quash the said award of the Industrial Court.

[6] On 25 March 1998 the High Court allowed the respondent's application with costs. This is now an appeal by the appellant directed against that decision of the High Court.

Grounds Of Appeal

[7] Although several grounds were raised by the appellants' counsel in this appeal, we do not propose to deal with all of them. It would suffice if we just deal with the relevant ones. They are as follows:

(i) The learned trial judge erred in law and in fact in holding that the appellant had failed to call one Mr. Chua an employee of the respondent, as a witness for the appellant to prove his case, when the respondent had failed to challenge in any manner in cross-examination the evidence of the appellant that Mr. Chua had been instructed by the Managing Director of the respondent to inform the appellant that he had been dismissed from service on 2 May 1992.

(ii) The learned trial judge erred in law and in fact in failing to appreciate that the jespondent's failure to cross-examine the appellant on his testimony regarding what Mr. Chua had told him, tantamounts to an admission that his evidence in examination-in-chief is true and unrebutted.

(iii) The learned trial judge misdirected himself in law in invoking s. 114(g) of the Evidence Act 1950 against the appellant notwithstanding the fact that the appellant's testimony before the Industrial Court was unchallenged.

(iv) The learned trial judge erred in law and in fact in failing to appreciate that the respondent's failure to reply to the appellant's letter dated 12 May 1992 denying the facts stated therein shows that the respondent failed to rebut the appellant's contention that he had been 'constructively' dismissed from service and that this piece of evidence when

looked together with the evidence as a whole proves that the appellant had been dismissed from service without just cause and excuse.

(v) The learned trial judge erred in law and in fact in holding that the absence of the appellant from work from 4 May 1992 to 17 May 1992 was a breach of his contract of employment when the evidence clearly showed that he had applied for such leave which is his entitlement.

Court's Findings

[8] The appellant alleged that on 2 May 1992 he had been informed by one Chua that he was sacked by the respondent and he had to return the keys to the lorry and the store. The respondent had denied the appellant's allegation herein.

[9] Section 101 Evidence Act 1950 provides that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he assets, must prove that those facts exist. It is said that the "burden of proof" lies on that person.

[10] The phrase "burden of proof" has two distinct meanings, namely, the burden of establishing a case and the burden of introducing evidence. Section 101 deals with the former while s. 102 of the Act deals with latter (*Evidence Practice and Procedure* 2nd edn, by Augustine Paul at p. 704).

[11] Commenting on the same matter, Salleh Abas FJ (as he then was) in *International Time & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86 had this to say at p. 87):

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expression burden of proof and onus of proof are used (*Nanji & Co. v. Jatashankar Dossa & Ors*. (1) and *Raghavamma v. Chenchamma* (2)). The first sense, signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* 7th Edition paras. 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as apposed to burden is not stable

> and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

[12] Reverting to the facts of the present appeal, the learned judge in his judgment (see pp. 21 and 22 of the Appeal Record) commented on the question of burden of proof. His Lordship said that in a proceeding under s. 20 of the 1967 Act, the burden of proving that an employee was dismissed with just cause and excuse lies with the employer. However, His Lordship emphasised that before this burden could shift to the employer the onus initially lies on the employee to prove that he was dismissed, especially so, here, when the respondent had categorically denied that they have dismissed the appellant. To this end, His Lordship found that the appellant had failed to discharge this burden by failing to call Mr. Chua. His Lordship then referred to the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 where the Supreme Court said:

> When the Industrial Court is dealing with a reference under section 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse.

[13] Based on the facts as a whole the learned judge found that the Industrial Court was wrong in concluding that there was 'constructive dismissal'. We agree with this finding of the learned judge. There were other evidence in favour of the respondent which the Industrial Court had failed to consider.

[14] In rejecting the appellant's application the learned judge found that the Industrial Court had erred in law in arriving at its decision to such an extent that the award is unreasonable and could not be justified. We agree with this decision.

[15] Further, we find that the Industrial Court had erred in law by invoking s. 114(g) of the Evidence Act against the respondent on the ground that the appellant had succeeded in shifting the evidential burden onto the respondent to rebut his allegation by calling Chua to give evidence when the respondent had in fact through its witnesses rebutted the appellant's allegation.

[16] It was wrong for the Industrial Court to have decided that the burden lies with the respondent to call Chua as a witness simply because he was the employee of the respondent.

[17] We find that, based on the evidence, the learned judge was right in invoking s. 114(g) of the Evidence Act 1950 against the appellant.

[18] Again, on the totality of the evidence in this case we find that the Industrial Court had erred in holding that the failure of the respondent to reply to the appellant's letter (CL1) was deemed as conclusive evidence that the appellant had been dismissed by the respondent without just cause.

[19] The learned judge was right in holding that the failure of the respondent to reply to the said letter cannot be taken as the main evidence that the appellant was dismissed without just cause by the respondent. Evaluation of other facts such as the testimony of the respondent's witnesses had to be taken into account (see *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145).

[20] On the issue of the absence of the appellant from work from 4 May 1992 to 17 May 1992 we agree with the finding of the learned judge that the burden was still on the appellant to prove that his application for leave dated 29 April 1992 *vide* the ordinary post had been accepted and approved by the respondent when the second witness (COW2) testified that he was not sure whether he has received the said letter.

[21] In *Pan Global Textiles Bhd, Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181, the Federal Court held that the Industrial Court had failed to consider the point that no employee could claim as a matter of right, leave of absence without permission and that remaining absent without any permission was a gross violation of discipline, which constituted misconduct justifying the discharge of a workman from service.

[22] The learned judge was right to quash the decision of the Industrial Court when the appellant had totally failed to prove its case that he was dismissed by the respondent without just cause.

Conclusion

[23] For the reasons we have enumerated above we find that there are no merits in this appeal. In the result the appeal is dismissed with costs. The deposit is to go to the respondent to account of taxed costs.